NOT FOR PUBLICATION — For upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Crim. No. 2000-012**
	)	
OTHNEIL CRAIG BRODHURST,	)	
	)	
Defendant.	)	
	)	

APPEARANCES:

Alphonso G. Andrews, Jr., Esq.
St. Croix, U.S.V.I.
For the plaintiff,

Richard Hunter, Esq.
St. Croix, U.S.V.I.
For the defendant.

MEMORANDUM

Moore, J.

This matter is before the Court on the defendant's motion to dismiss the indictment due to a violation of his rights under the Speedy Trial Act, 18 U.S.C. §§ 3161-3174. He asserts that the speedy trial clock expired in October 2000, requiring dismissal of the indictment. The United States, on the other hand, argues that up to the time of the hearing on this motion, only ten nonexcludable days had transpired since the defendant's arraignment on March 3, 2000. Having reviewed the record, the Court concludes that there remains ample time to commence trial, currently scheduled for next Monday, September 24, 2001.

Discussion

The Speedy Trial Act requires that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant . . . shall commence within seventy days . . . from the date the defendant has appeared before a judicial officer in the court in which such charge is pending." 18 U.S.C. § 3161(c)(1). If the defendant is not brought to trial within seventy nonexcludable days, the court must dismiss the indictment on motion of the defendant. *United States v. Hamilton*, 46 F.3d 372 (3d Cir. 1995). Because the vast majority of the days elapsed are excludable under the statute, the Court will not dismiss the indictment.

The speedy trial clock began to tick in this case on March 3, 2000, the date the defendant was arraigned. *See* 18 U.S.C. § 3161(c)(1). On March 14, 2000, the defendant filed two pretrial motions, one of which was a motion for an order appointing a psychiatrist to evaluate the defendant. Up to that date, ten days had counted against the Speedy Trial clock. *See id.* § 3161(h)(1)(F); *see also United States v. Lattany*, 982 F.2d 866, 872 (3d Cir. 1992) ("In calculating includable time, both the date on which an event occurs or a motion is filed and the date on which the court disposes of a motion are excluded."). The next day, Magistrate Judge Jeffrey L. Resnick granted the motion

for a psychiatric evaluation, ordering further that the case would be removed from the calendar pending the report and that the time would be excluded from speedy trial calculations. *See id.* § 3161(h)(1)(A). The psychiatrist's report was filed on July 27, 2000. Ordinarily, this date might have triggered the recommencing of the clock, but intervening circumstances demonstrated that the defendant was not prepared for trial, and the Court accordingly accommodated the defendant's needs for preparation.

At a May 15, 2000 calendar call, the parties agreed to an August trial date because the psychiatric report was not ready, and the previously scheduled June 5, 2000, trial date was continued. On July 18, 2000, in accordance with the parties' agreement in May, Magistrate Judge Resnick set a firm trial date for August 21, 2000. On August 16, 2000, however, the judge assigned to hear the case, Chief Judge Raymond L. Finch, recused himself from presiding over the trial. In his recusal order, Judge Finch rescheduled the trial *sine die*, to be heard before the undersigned. On September 6, 2000, the Magistrate Judge issued an order setting trial for October 23, 2000.

The defendant counts as nonexcludable the days between July 27, 2000, the date the psychiatrist's report was filed, and August 16, 2000, the date Judge Finch issued his recusal order.

The United States takes the position that all the days from June 5, 2000 to August 21, 2000 are excludable because the defendant agreed in May to continue the June trial date to August so that his requested psychiatrist's report could be prepared. According to the United States, this agreed-to continuance was in effect an ends-of-justice continuance, authorized under 18 U.S.C. § 3161(h)(8)(A). The Court will resolve this initial disputed calculation before moving on to complete its calculations.

The Speedy Trial Act requires the Court to set forth "its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant." *Id.* "If such a statement is not provided, the delay occasioned by a continuance cannot be excluded from the time within which a criminal defendant must be brought to trial." *Lattany*, 982 F.2d at 877. The Court in *Lattany* further explained:

> The purpose of the requirement that reasons be stated is to insure careful consideration of the relevant factors by the trial court and to provide a reviewable record on appeal. Both purposes are served if the text of the order, taken together with more detailed subsequent statements, adequately explains the factual basis for the continuance under the relevant criteria.

Id. at 878 (internal quotations omitted). In *Lattany*, the Court of Appeals focused on the need for reviewable justification, articulated by the district court before granting the

continuance, rather than the form of the order: "Although the district court may not merely incorporate by reference the reasons set out in the statute, it is not necessary for it to articulate facts which are obvious and are set forth in the motion for the continuance itself." *Id.* (internal quotations and citations omitted). The Court of Appeals made it clear that a district court can state reasons contemporaneously with an order continuing a trial that demonstrate an ends-of-justice finding without actually using the words, "ends of justice" or referring to the statute at the time of the continuance. District courts are implicitly urged to supplement with such references, but are reminded that "appropriate findings showing that the interests of justice require a further continuance can be made contemporaneously with any order extending the time." *Id.* at 883 (emphasis added).

Here, the United States argues in effect that the Magistrate Judge's reason for continuing the June trial date — that the defendant's report was not ready — properly demonstrated that the ends of justice would be served, although no statement to that effect was placed in the record. The Court agrees. Magistrate Judge Resnick made it very clear in his order that the June trial date would be continued because the defendant's own psychiatric report was not ready. Moreover, it was obviously in the best

interests of justice to delay trial until the psychiatrist's report had been filed and to afford the defendant an opportunity to review it before trial. That the defendant agreed to an August trial date further supports that the continuance was also in the defendant's best interest. Accordingly, the days up to August 21, 2000 are excluded from the calculation. The clock recommenced on August 22, 2000.

The defendant next argues that the days that elapsed between August 16, 2000, the date Judge Finch recused himself, and September 6, 2000, the date Judge Resnick issued an order setting an October trial date, are excludable. (*See* Mot. to Dismiss at 3.) Although Judge Finch did not expressly state a reason for this continuance, it was obviously occasioned by the reassignment of judges. Nevertheless, given that the defendant was not in any way involved with this continuance, and given that there is no factual statement in the record that would support an ends-of-justice continuance, the Court will resolve the question in favor of the defendant and count the fifteen days between August 21, 2000 and September 6, 2000. Thus, as of September 6, 2000, a total of twenty-five nonexcludable days had elapsed. The speedy trial clock would have recommenced on September 7, 2000, had not another delay occasioned by the defendant taken place in the interim.

In his September 6, 2000 order setting trial for October 23, 2000, the Magistrate Judge stated that the reason trial would not be set for September 11, 2000, as apparently planned, was that "counsel for defendant represented that he could not be ready for trial" on that date.[1] Again, the United States takes the position that this reason "facially satisfies" the requirements for a proper ends-of-justice continuance under 18 U.S.C. § 3161(h)(8)(A) & (B)(iv), so that the days between September 6, 2000 and October 23, 2000 are excludable. The defendant counters that "no 'ends of justice' findings were made by the Court in continuing the trial date." (*See* Def.'s Reply at 3.)[2]

The defendant again ignores that the trial date was continued to accommodate his own preparation. He also ignores

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[1] In the meantime, on September 7, 2000, the United States filed a motion for a continuance, stopping the clock through September 13th, when the motion was denied.

[2] The defendant cites *United States v. Brenna*, 878 F.2d 117 (3d Cir. 1989) in support of his conclusion. Although the court in *Brenna* did state that, at a minimum, the trial judge must refer to the applicable statutory provision or say something about "ends-of-justice" in its order continuing trial, its later analysis in *Lattany* suggests that the requirements in *Brenna* merely "supplement" but do not replace the requirements set forth in *United States v. Rivera Construction Co.*, 863 F.2d 293 (3d Cir. 1988). In *Rivera*, the district court granted a continuance without referring to the statute, merely stating that the continuance was necessary to give the defendant time to prepare. The Court of Appeals held that this order met the requirements of the Speedy Trial Act, and the court in *Lattany* expressly noted that *Rivera* is still good law. *See Lattany*, 982 F.2d at 879 n. 16; *id.* at 880 ("We hold that the district court met the requirements of Rivera . . . ."). Although *Lattany* is not a paragon of clarity overall, it does support excluding time after a continuance is granted when the order granting the continuance contemporaneously states reasons that would satisfy the requirements for an ends-of-justice continuance. *Id.* at 883.

that the Magistrate Judge stated a reason, on the record, that demonstrates an ends-of-justice continuance. For the reasons stated above in discussing *Lattany*, the days between September 6, 2000 and October 23, 2000 are excluded from the calculations. The clock would have recommenced on October 24, 2000, but for another development apparently brought about by the defendant.

On October 19, 2000, counsel for the defendant moved to withdraw and for a continuance on the ground that the defendant would not cooperate in preparing for trial. The judge granted defense counsel's motion to withdraw and for a continuance on the same day, but without setting a new trial date. Although the Magistrate Judge did not repeat the reason for granting a continuance, it is obvious from the representations of counsel in his motion to withdraw that the continuance was granted to afford new counsel adequate time to prepare for trial. *See Lattany*, 982 F.2d at 878. Further, the requirements of the Speedy Trial Act are satisfied by properly supported open-ended ends-of-justice continuances granted before the expiration of the seventy-day period. *See id.* at 881. Thus, the clock remained stopped after October 23, 2000, and on November 2, 2000, the Magistrate Judge entered an order setting new discovery deadlines and stating that trial would be scheduled for January 2001. Thus, at least through December 2000, still only twenty-five

nonexcludable days had elapsed.

The Court need not consider whether the clock started again after December 2000 because on December 11, 2000, the defendant filed a motion to dismiss certain counts of the indictment. That motion was not heard until August 16, 2001. Section 3161(h)(1)(F) of the Speedy Trial Act excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."[3] 18 U.S.C. § 3161(h)(1)(F). The Supreme Court has interpreted this section "to exclude all time between the filing of and the hearing on a motion whether the hearing was prompt or not." *Henderson v. United States*, 476 U.S. 321, 326 (1986). Further, "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court" is excludable. 18 U.S.C. § 3161(h)(1)(J). As a result, the clock did not recommence until thirty days after the hearing on the motions to dismiss, which was September 15, 2000. Thus, as of the date of this Memorandum and accompanying Order, only two more nonexcludable days elapsed in addition to the twenty-five already counted, bringing the total nonexcludable days to twenty-seven.

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[3] Notably, the defendant failed to mention this clock-stopping motion to dismiss in his motion to dismiss for Speedy Trial Act violations.

Conclusion

Because only twenty-seven nonexcludable days have elapsed since the defendant was arraigned, the Court will deny the defendant's motion to dismiss for violation of the Speedy Trial Act. An appropriate order follows.

ENTERED this 18th day of September, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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Defendant.	)	
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APPEARANCES:

Alphonso G. Andrews, Jr., Esq.
St. Croix, U.S.V.I.
For the plaintiff,

Richard Hunter, Esq.
St. Croix, U.S.V.I.
For the defendant.

ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the defendant's motion to dismiss for violations of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, is **DENIED.**

ENTERED this 18th day of September, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies to:

Honorable Jeffrey L. Resnick

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